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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner,

v.

HAROLD GARRISON,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the Fourth Amendment require suppression of heroin seized from Respondent's adjoining apartment during execution of a warrant for another person's third floor apartment when the police reasonably believed that there was only one third floor apartment, both when applying for the warrant and during its execution?

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No. 85-759

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF MARYLAND,

Petitioner

v.

HAROLD GARRISON,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 303 Md. 385, 494 A.2d 193 (1985). The opinion of the Court of Special Appeals of

Maryland is reported at 58 Md. App. 417, 473 A.2d 514 (1984).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The Court of Appeals of Maryland denied the Motion for Reconsideration on September 3, 1985.

The Petition for Writ of Certiorari was filed in this Court on November 1, 1985.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searchs and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On May 21, 1982, Baltimore City Police Officers found heroin in the bedroom of Respondent's third floor apartment at 2036 Park Avenue (J.A. 25). At the time, they were executing a search and seizure warrant for both Respondent's neighbor, Lawrence

McWebb, and the third floor apartment at the Park Avenue address (J.A. 9, 11). The police did not learn, until after they discovered the heroin, that there were indeed two third floor apartments at 2036 Park Avenue and that they had been searching both simultaneously. Respondent was charged with violation of Maryland's controlled dangerous substances law as a result of the execution of the warrant. He moved to suppress the fruits of the search and seizure on the ground that his Fourth Amendment rights had been violated.

Based on the affidavit and application for the search warrant and on the testimony at the suppression hearing, the following facts were established. A confidential, reliable informant advised Baltimore City Police Detective Albert Marcus, between May 16 and 21, 1982, that a person named "Red Cross" was selling marijuana from his third floor apartment at 2036 Park Avenue and that the informant had purchased marijuana from that person within the prior 24 hours (J.A. 6). Detective Marcus, who was trained in investigating narcotics violations, obtained a description of Red Cross and the apartment building from the informant.

He identified 2036 Park Avenue as a three-story brick dwelling with the numerals 2-0-3-6 on the front and verified that it fit the description given by the informant (J.A. 7, 35). He then contacted the Baltimore Gas and Electric Company to find out who occupied the third floor apartment. He was told the apartment was in the name of Lawrence McWebb[1] (J.A. 7, 35). Detective Marcus then found that a Lawrence McWebb had an arrest record with the Baltimore City Police on which the description matched that given by the informant. Finally, he took the picture of that Lawrence McWebb to the informant who identified him as the man he knew as "Red Cross." (J.A. 7).

Armed with that information, Detective Marcus sought a search and seizure warrant for McWebb and his apartment. The affidavit recited the foregoing

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[1] At the suppression hearing, Detective Marcus explained that he called the number for the Baltimore Gas and Electric computer to ask to whom the third floor apartment was listed. He said: "I asked if there is a front or rear or middle room. They told me, one third floor was only listed to Lawrence McWebb." (J.A. 36-38).

data and stated that no controlled buy or further observations were attempted because of the difficulty in observing activities to and from a particular apartment within the building (J.A. 7).

District Court Judge I. Sewell Lamdin issued the warrant for both McWebb and for "2036 Park Avenue third floor apartment." At 3:00 p.m. that afternoon, the warrant was executed by Detective Marcus and five other Baltimore City police officers.

Upon arrival at the apartment building, one officer went to the front door to attempt to gain entry (J.A. 12-13). He saw seven mailboxes, but saw neither numbers, letters nor McWebb's name. No one answered when he rang all seven bells (J.A. 13-15).

Fortuitously, McWebb drove up, was detained by the police and advised of the search warrant (J.A. 15). His key was used to open the front door and everyone proceeded up the stairs to the third floor (J.A. 15). The locked door at the top of the stairs was also opened by McWebb's key (J.A. 16). Inside, they entered a foyer with rooms to the left and right (J.A. 18-19). The doors to those rooms, which opened to the

inside, were open and clothes were hanging from them (J.A. 20). Respondent Harold Garrison, dressed in night clothes, was standing to the right side of the foyer (J.A. 16). McWebb and Garrison were placed in the living room to the left, attended by one officer (J.A. 38-39).

The other officers separated to search the premises. Some searched what turned out to be Respondent's apartment and others searched McWebb's. They found a revolver, marijuana, two electric bills,[2] syringes, a cap for cooking heroin, currency totalling over $5,000.00, eleven packets of heroin, and other paraphernalia (J.A. 25-31). During the search, neither Respondent nor McWebb questioned the search of the entire floor or indicated that there were two apartments (J.A. 38, 39-40). One detective answered the phone in what turned out to be

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[2] The electric bills in McWebb's and Respondent's names indicate apartments "3FL R" and "3FL F." Detective Shea picked them up as evidence of ownership of the premises, but did not look at the names at that time. At the end of a search, the officers typically review the paperwork to determine which documents to take and which to leave (M2. 29-31).

Respondent's bedroom and the caller asked for "Red Cross." (J.A. 22-24).

It was not until one of the officers had walked throughout the entire third floor and saw two kitchens that any officer suspected that there might be two apartments. The search was halted immediately (J.A. 39). Afterwards, as part of the return, the officer recounted what happened at the time of the search (J.A. 10).

The trial court denied the motions to suppress filed by both Respondent and McWebb based on the following findings of fact:

> "Now the Court, based on what it finds to be critical evidence, makes the following findings of facts: One, that on May 21st, 1982, the police executed a search and seizure warrant for premises 2036 Park Avenue, third floor apartment. Two, the police had reliable information to believe the Defendant McWebb resided in a third floor apartment, did not know of another apartment on the third floor. Now, while it was evidence that there were a number of apartments in the building, police were unaware where these apartments were located or the character of the building.
>
> "Three, the Defendant McWebb was detained outside of 2036 Park

Avenue. With the keys furnished by him, the police gained entrance through a locked front door to the building, next to the door were seven mail boxes with bells, or indicating were bells under each mailbox, but no names were reflected on any of the mailboxes. Further, McWebb's name was not visible on any of the mail boxes or any area adjacent thereto.

"Next, the police were directed to the third floor by McWebb without any notice or knowledge of the layout of that area. Five, that entrance to the third floor was gained through a common marked door which gave no indication that there was more than one apartment located on said floor. There was no one to alert anyone to indicate that there were more than one apartment.

"Next, that upon opening said door, police found the Defendant Garrison standing there in his night clothes. Next, seven, upon entrance to the third floor, police saw an open door to the left, later identified as McWebb's apartment, and also an open door to the right later identified as Garrison's apartment. In fact, no door was visible at the time the police entered and the police were unaware at that time that there were two apartments.

"Eight, that from that position of the hallway area leading to the two apartments, the police saw and based on their expertise located on top of the dresser in an open room to the right, a quantity of marijuana. Entrance was made into that room

later identified as the apartment of Defendant Garrison where a police or the police found over the front door or the door leading to that area articles of men's clothing.

"No numbers were observed by police upon entering the apartment which would alert them to a separate apartment. The room was searched, and in the apartment of Defendant Garrison was recovered a quantity of heroin and approximately four thousand dollars in cash.

"Nine, also significant or significantly at the time, neither Defendant Garrison nor Defendant McWebb indicated that there were two separate apartments on the third floor. Ten, that a copy of the search and seizure warrant was given to the Defendant McWebb. The inventory listed all the evidence seized from both apartments without indicating which pieces of evidence were found in each location. Eleven, it is clear that there was a common door which could be opened at the time of the search affording access between the two apartments.

"The evidence indicates that while each apartment or the occupant of each apartment could have privacy by locking this door, nevertheless, there was free access judging from all the evidence at the time the police arrived there between the two apartments, and that the Defendants so intended based on the evidence that has been submitted before me." (J.A. 41-44).

Thereafter, Respondent was convicted at a bench trial of possession of heroin with intent to distribute it. He was sentenced to 15 years imprisonment. On direct appeal to the Court of Special Appeals, the judgment was affirmed, that Court concluding (1) "that the facts relied upon by the trial judge were sufficient to support his conclusion that the police could not reasonably have determined, prior to their entry, that the third floor at 2036 Park Avenue contained more than one apartment." (APC 20-21), and (2) that the court "could reasonably conclude that both persons seemed to be making themselves at home thoughout the third floor." (APC 26).

On certiorari review, the Court of Appeals of Maryland reversed the judgments of the lower courts, finding that Respondent's motion to suppress should have been granted. It concluded that "the warrant . . . precisely and unambiguously described the premises to be searched: McWebb's apartment. The police then expanded the search warrant to a second apartment not described or mentioned in the warrant." (APC 43). The State's motion for reconsideration was denied without opinion.

SUMMARY OF ARGUMENT

Evidence is suppressed under the Fourth Amendment only if it was the fruit of an unconstitutional search or seizure and the exclusionary rule applies. The constitutional standard of reasonableness allows for objectively reasonable good faith factual mistakes. The search warrant for the third floor apartment occupied by Lawrence McWebb based upon the understandable mistaken belief that there was only one third floor apartment, was valid. The search of Respondent's apartment resulted from the misinformation supplied by a utility company and the misleading appearances during the police entry. The police reasonably believed they were searching a place covered by the warrant. The search was, thus, constitutional. Even were it not, however, the exclusionary rule would not apply because the officers acted in objectively reasonable reliance on the warrant.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT REQUIRE SUPPRESSION OF HEROIN SEIZED FROM RESPONDENT'S ADJOINING APARTMENT DURING EXECUTION OF A WARRANT FOR ANOTHER PERSON'S THIRD FLOOR APARTMENT WHEN THE POLICE REASONABLY BELIEVED THAT THERE WAS ONLY ONE THIRD FLOOR APARTMENT, BOTH WHEN APPLYING FOR THE WARRANT AND DURING ITS EXECUTION.

Suppression of evidence under the Fourth Amendment in a criminal case requires an affirmative answer to two distinct questions: first, was there an unconstitutional search or seizure, and second, if so, should the exclusionary sanction be applied. United States v. Leon, __ U.S. __, 104 S.Ct. 3405, 3412, 82 L.Ed.2d 677, 688 (1984).[3] In this case, the answer to the first question is no. Even were there some illegality, however, the answer to the second question would still be no. As a result, there would be no cause to suppress the evidence.

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[3] A defendant's standing or right to assert the violation may also be questioned, Rakas v. Illinois, 439 U.S. 128 (1978).

In analyzing the second question, this Court recently concluded that, assuming an unconstitutional search and seizure, the exclusionary rule would not apply when the police acted in the objectively reasonable belief that their action was constitutional, such as in reliance on a subsequently invalidated search warrant. Leon, supra; Massachusetts v. Sheppard, ___ U.S. ___, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). Simply analyzed in that fashion, it is easy to conclude that the evidence in this case should not have been suppressed: the police were acting in an objectively reasonable belief that the search was validly authorized by the warrant. That easy answer, however, fails to explain why the exclusionary rule does not apply here. It does not draw the proper and necessary distinction between constitutional, albeit mistaken, behavior by the police, and the good faith exception to the exclusionary rule for objectively reasonable, but unconstitutional, searches and seizures.

There are important reasons to distinguish between a mistake not amounting to a Fourth

Amendment violation and an unconstitutional action that is nevertheless objectively reasonable. First, the police should not be deprived of the clearest possible guidance for future behavior simply because the result in the criminal case (i.e. non-suppression of evidence) may be the same regardless of which rationale is used. Leon, __ U.S. at __, 104 S.Ct. at 3422. Second, the question of civil liability under 42 U.S.C. §1983 parallels this distinction. City of Los Angeles v. Heller, __ U.S. __ (No. 85-531, filed April 21, 1986).

If there was no constitutional violation, no cause of action can be stated and the claim should be dismissed, Rodriguez v. Ritchey, 556 F.2d 1185, 1190 and 92 (5th Cir. 1977). If the mistaken judgment results in an unconstitutional action, the officer will be entitled only to qualified immunity if the judgment was nevertheless objectively reasonable, Malley v. Briggs, __ U.S. __, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271, 281 (1986). That determination is only made after a defendant has pleaded objective good faith and the issue (whether the asserted unconstitutional actions violated clearly established constitutional rights of

which a reasonable person would have known) has been presented on summary judgment or otherwise. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Mitchell v. Forsyth, 472 U.S. ___, 105 S.Ct. 2806, 86 L.Ed.2d 411, 425-26 (1985).

Finally, the good faith exception itself is not only controversial, but raises a host of new questions about its appropriate reach. See, e.g., S. Wasserstrom and W. Mertens, "The Exclusionary Rule on the Scaffold: But was it a Fair Trial?," 22 Am.Cr.L.Rev. 85, 118-22 (1984) (Will subjective bad faith or unreasonableness defeat the exception?); S. Sachs, "The Exclusionary Rule: A Prosecutor's Defense," 1 Crim.J. Ethics, 28, 32 (1982) (premium on police ignorance will "depress Fourth Amendment compliance to the level of our tolerance for the lowest standards of the least informed officer.") It is unnecessary to grapple with such issues when the conduct does not violate the Constitution.

The difference between constitutional and unconstitutional good faith mistakes is this: if the mistake is simply one of fact (e.g. there is only one

third floor apartment), which, if true, would render the search unquestionably constitutional, then the search was constitutional. On the other hand, if the mistake leads to an improper legal conclusion (e.g. there was probable cause), then there has been an unconstitutional search and the objective reasonableness or good faith of the officer must be examined.[4]

That not every use of the term "good faith" in describing a police officer's conduct necessarily invokes the good faith exception to the exclusionary rule is illustrated by prior cases where that term or its equivalent was used long before Leon and Sheppard in determining whether a Fourth Amendment violation had even occurred. The term was used in Hill v. California, 401 U.S. 797, 803-04 (1971),[5] in concluding

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[4] A similar distinction is noted in W. LaFave, 1 Search and Seizure, §1.2 (1978, 1986 Suppl. at 8-9).

[5] Respondent may well be correct that the search in Hill was unconstitutional under Chimel v. California, 395 U.S. 752 (1969) and Payton v. New York, 445 U.S. 573 (1980). That does not alter the continued validity of the central principle that an arrest made because of a good faith mistake in identification is reasonable under the Fourth Amendment.

that the police had probable cause to arrest Miller because they mistakenly (but in good faith) believed him to be Hill, for whom they had probable cause to arrest. This was but a recognition that the Fourth Amendment does not require perfection:

> "[T]he officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." (Emphasis added).

Similarly, in Michigan v. DiFillippo, 443 U.S. 31, 33 (1979), an arrest was valid when made "in good faith reliance" on an ordinance later declared unconstitutional. Probable cause was not lacking simply because the officer did not anticipate that a court would hold the law unconstitutional. In a related context, this Court has said that "[t]he Constitution does not guarantee that only the guilty will be arrested." Baker v. McCollan, 443 U.S. 137, 145 (1979). Reasonable,

innocent mistakes, discovered after the fact, do not mean that probable cause was lacking:

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." Brinegar v. United States, 338 U.S. 160, 176 (1949).[6]

The result urged by the State here has already received tacit approval in Franks v. Delaware, 438 U.S. 154 (1978), where deliberate or reckless falsehoods were distinguished from negligent or innocent mistakes. Only materially false statements made by an affiant deliberately or with reckless disregard for

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6 In United States v. Matlock, 415 U.S. 164, 177 n.14 (1974), the Court expressly left open the question whether an officer's reasonable belief that a third party had sufficient authority to consent to a search would satisfy the Fourth Amendment even if that person lacked actual authority. The authors of one scholarly article have predicted that such searches will be upheld as a reasonable mistake of fact: W. Mertens and S. Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo.L.J. 365, 429 n.343 (December 1981).

the truth will render a warrant invalid. Id. The Constitution does not require perfection:

> "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a 'truthful showing' (emphasis in original). This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." (quoting from United States v. Halsey, 257 F.Supp. 1002, 1005 (S.D. N.Y. 1966), aff'd, Docket No. 31369 (2d Cir. June 12, 1967).) 438 U.S. at 165.

Citizens supplying information upon which the police rely may also make mistakes. But, this Court has said:

> "We have never required that informants used by the police be infallible, and can see no reason to impose such a requirement in this case. Probable cause, particularly when police have obtained a warrant, simply does not require the perfection the dissent finds necessary." Illinois v. Gates, 462 U.S. 213, 245 n.14 (1983).

The wisdom in recognizing that police and informants are unfortunately fallible is illustrated by the number of cases involving mistaken identity or searches of the wrong premises. Issues arise both in terms of motions to suppress evidence in criminal trials and in damage suits for civil rights violations.

One example much like the instant case is United States v. Murrie, 534 F.2d 695 (6th Cir. 1976). The federal agents had a warrant to arrest Tommie Murrie. When they arrived at the house to arrest him, they discovered that the house was divided into two flats and officers went to both floors. Downstairs, they found Tommie Murrie, Jr., who identified himself as Tommie Murrie. He was arrested and a search of the couch where he was sitting revealed a pistol. As a previous felon, his possession of the firearm was illegal. Upstairs, the agents found Tommie Murrie, Sr., whom they later found out was the one named in the warrant. The Sixth Circuit found:

> "there was probable cause for the arrest of Tommie Murrie, Jr., since he identified himself by the name for which the arrest warrant had been issued, and the officer had no knowledge at the time that there were two

> Tommie Murries involved." 534 F.2d at 696-97.

The District of Columbia Court of Appeals upheld a warrantless search incident to arrest in United States v. Allen, 629 F.2d 51 (D.C. Cir. 1980), despite an officer's honest mistake regarding whether the particular establishment had a liquor license:

> "[A]n arrest based on factual assumptions later found erroneous may be valid if there is adequate factual basis in the record to determine the reasonableness of the officer's conduct in making the arrest."

The First Circuit found against a plaintiff who was mistakenly arrested in Gero v. Henault, 740 F.2d 78, 85 (1st Cir. 1984), cert. denied, Gero v. Pines, __ U.S. ___, 105 S.Ct. 965 (1985) stating that the "only question is whether it was reasonable for the arresting officers to believe that the person arrested was the one sought." See also, United States v. Glover, 725 F.2d 120 (D.C. Cir.), cert. denied, __ U.S. __, 104 S.Ct. 1682 (1984) (applying Hill and upholding arrest of Glover under arrest warrant for Mathis); United States v. McEachern, 675 F.2d 618, 621 (4th Cir. 1982) (arrest

of Jimmy McEachern under warrant for Ronnie McEachern valid, applying Hill.)

It is thus not novel to suggest that the constitutionality of police conduct turns on reasonable appearances rather than on absolute certainty or more accurate hindsight. The Fourth Amendment has never insisted on infallible precision and this Court has long recognized that police officers are, at times, fallible.

The rationale of the mistaken identity arrest cases applies with equal force to the search situation. The interference with a person's privacy occasioned by an erroneous search is, if anything, less compelling than the deprivation of liberty occasioned by an erroneous arrest. In both situations the promise of the particularity clause of the Fourth Amendment[7] has been thwarted - the wrong place has been searched or the wrong person or thing has been seized. Thus, proper resolution of the substantive Fourth Amendment issue here turns on the reasonableness of the

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[7] That clause "applies both to arrest and search warrants," Wong Sun v. United States, 371 U.S. 471, 481 n.9 (1963).

police belief that there was only one third floor apartment both when the warrant was issued and when it was executed.

Issuance of Warrant

The purpose of the particularlity requirement, of course, is to prevent general searches:

> "By limiting authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search is carefully tailored to the justification, and does not resemble the wide-ranging general searches that the Framers intended to prohibit." (footnote omitted) Leon, and Sheppard, ___ U.S. at ___, 82 L.Ed.2d 722, 725, 104 S.Ct. 3446, 3448 (Stevens, J. concurring and dissenting).

The description of the place to be searched is sufficiently particular if an officer can "with reasonable effort ascertain and identify the place intended." Steele v. United States, 267 U.S. 498, 503 (1925). The two goals are both to enable the officers who execute the warrant to know where they are permitted to search and what or whom they are permitted to seize, and to enable the citizen whose privacy, possessory rights or liberty is affected to

ascertain the limits of the authorization, Leon and Sheppard, 104 S.Ct. at 3449, 82 L.Ed.2d at 726 (Stevens, J.).

Both of those aspects of the particularity requirement were satisfied by the description in this case. A single warrant authorized the search of both Lawrence McWebb and the third floor apartment at 2036 Park Avenue. The affidavit stated clearly that McWebb was allegedly selling marijuana out of "his" apartment, the only one located on the third floor. The officer who sought the warrant took reasonable steps to determine the location and description of the apartment from which the marijuana was being sold. Based on the information from the informant, he consulted the Baltimore Gas and Electric Company for the name of the occupant. He was told then that there was only one third floor apartment, the one occupied by McWebb. There was no reason to question the validity of that information prior to or even during the search until the second kitchen was found. It follows that there was reasonable compliance with the particularity requirement of the Fourth Amendment.

In many cases, inaccuracies and mistakes make the description less than perfect or even foolproof. But the test for determining whether the description was sufficiently particular is simply whether the police reasonably undertook to describe the place they had probable cause to search, given the information at their disposal at the time. Illustrations and accommodation of the practical limitations in ascertaining precise descriptions of multiple occupancy structures are collected in Annot., Search Warrant: Sufficiency of Description of Apartment or Room to be Searched in Multiple-Occupancy Structure, 11 A.L.R.3d 1330 (1967, 1985 Supp.) and W. LaFave, 2 Search and Seizure, §4.5. For example, in United States v. Prout, 526 F.2d 380, rehearing and rehearing in banc denied, 529 F.2d 999 (5th Cir.), cert. denied, 429 U.S. 840 (1976), a warrant describing a real estate office was found to encompass the upstairs apartment as well, even though the apartment in reality had a different street address. The determining factor:

> "is not whether the description given is technically accurate in every detail but rather whether the description is sufficient to enable the executing

> officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched which is not the one intended to be searched under the search warrant.'" 526 F.2d at 387-88 (quoting United States v. Aklaroff, 323 F.Supp. 296, 321 (S.D. Fla. 1971).)

So, too, in People v. Thomas, 388 N.E.2d 941 (Ill.App. 1979), a warrant for the third floor apartment at a particular address sufficiently described the entire apartment despite the fact that three rooms were sublet to people other than the one from whom cocaine had been purchased.

Here a search of McWebb's third floor apartment was authorized by the warrant.[8] Had the existence of two apartments on the third floor been obvious when the officers reached the landing, neither they nor McWebb would have had any trouble in

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[8] Under Maryland procedure, copies of the application and affidavit are to be served on the person whose property is seized along with the warrant itself, even if the former are not formally incorporated in the warrant. Md.Rule 4-601(c). Thus, they are available at the time of the search to assist in identifying the proper object of the search.

ascertaining which apartment was properly subject to search. The separateness of the two apartments was not apparent, however, and the police proceeded to execute the warrant for the one third floor apartment they found. (The reasonableness of the execution of the warrant is a separate consideration and will be discussed, infra.) Under these circumstances, the warrant particularly described the place to be searched and was valid.

Execution of Warrant

Even a search under a valid warrant may become unconstitutional, however, if conducted in an unreasonable manner, such as one effected with excessive force, or one accompanied by gratuitous destruction of property, or one lasting an unnecessary length of time, Dalia v. United States, 441 U.S. 238, 258 (1979); Tarplay v. Greene, 684 F.2d 1, 8 (D.C. Cir. 1982); Duncan v. Barnes, 592 F.2d 1336, 1338 (5th Cir. 1979). Essentially, that type of conduct constitutes an unreasonable scope violation and can render execution of a valid warrant unconstitutional. In each instance, the police have improperly exceeded the authorization

of the warrant. So, too, when the police search a place not intended to be included, it must be determined whether they unreasonably exceeded the scope of the warrant. Proper execution of a search warrant means a search of "only those places and for those objects that it was reasonable to beiieve were covered by the warrant." Leon, __ U.S. at __, n.19, 104 S.Ct. at 3419 n.19, 82 L.Ed.2d at 695 n.19.

Here, the warrant authorized a search of the apartment on the third floor of 2036 Park Avenue. Respondent's apartment was on that floor and was thus arguably included within the warrant. Even if the warrant is read more narrowly to encompass only McWebb's half of the third floor, the search was constitutional because the police reasonably believed they were in McWebb's apartment.

The trial court unquestionably found that the police had no actual notice of the existence of the separate apartments until after the heroin was found. Given the physical appearance of the entry way, the arrival of McWebb and the entry gained with his key, the failure of either McWebb or Respondent to

question the search, the open access between both sides of the third floor, and the information from the informant and the utility company, the police reasonably believed that they were properly acting within the scope of the warrant. When they discovered the two kitchens - after seizing the heroin - they realized the mistake and ceased the search.

The same policies that insulate innocent factual mistakes in the warrant-issuing stage from constitutional challenge apply with equal force to the actual search. Belief that the police are acting properly within the scope of their authorization, if reasonably based on the facts and circumstances as they appeared at the time, is not unconstitutional.

Good Faith Exception to the Exclusionary Rule

Were this Court to find, however, that a constitutional violation occured simply because the description of the premises was sufficiently erroneous to allow a search of Respondent's apartment, then we urge the application of the good faith exception to the exclusionary rule. As put in LaFave, 2 Search and Seizure, §4.5 (1986 Cum.Supp.), "under Leon

suppression is required because of a particularity defect only if the warrant was 'so facially deficient - i.e. in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid.'" Accord, United States v. Savoca, 761 F.2d 292, 296 (6th Cir.), cert. denied, ___ U.S. ___, 106 S.Ct. 153 (1985). The same reasons advanced by Petitioner above for finding no unconstitutional behavior at all would apply if the Court needs to address the applicability of the exclusionary rule and would dictate a finding that the police were objectively reasonable in believing that the warrant validly authorized their search.

Under ordinary circumstances, a check with a utility company can be expected to yield reliable information. Here, that information coupled with the total absence of any indication from the informant that there were two apartments reasonably led the police to conclude that there was only one third floor apartment, that occupied by McWebb.

Similarly, it was reasonable to assume that the premises to which they gained access by using

McWebb's key were, indeed, McWebb's apartment. People do not normally leave exterior doors open with clothes hanging on them, nor do they fail to protest when two apartments are searched under a warrant for one. The belatedly discovered indications of separate apartments (electric bills, unused deadbolt locks, numbers on door jambs) were not sufficiently obvious to alert the officers of their mistake. Rather, all appearances supported the conclusion in the warrant: McWebb's was the only third floor apartment at 2036 Park Avenue and the police were searching that apartment when they discovered and seized the heroin.

To apply the exclusionary rule under these circumstances would not further its deterrent purpose. Instead, it would signal to the police that they are to be held to an impossible standard - that of perfection for themselves and for those who supply them with information. Where, as here, the police make a reasonable investigation and rely in good faith on appearances, there is no misconduct to be deterred and no need to apply the exclusionary rule.

CONCLUSION

As the foregoing demonstrates, the Fourth Amendment requires only sufficient probability, not certainty. The reasonable mistake of fact that led the police in this case to obtain and execute a warrant for the third floor apartment at 2036 Park Avenue when Respondent and the target McWebb actually occupied separate apartments did not render the search unconstitutional. Proper evaluation of the conduct of the police in obtaining and executing the warrant reveals that they acted in an objectively reasonable manner. Respondent is not entitled to have the heroin suppressed and Petitioner requests that the judgment of the Court of Appeals of Maryland be reversed.

Respectfully submitted,

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